CONTENTS.

LIST OF REFERENCES.

Supreme Court of the United States.

OCTOBER TERM, 1918.

No. 343.

LOUISE L. COLEMAN, as Surviving Administratrix of the Estate of WALTER H. COLEMAN, Deceased,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

Status.

Appellant sued in the Court of Claims to recover $6,721.71 which she contends was directed to be refunded to her by the third section of the Act of Congress of June 27, 1902 (*Chap. 1160, 32 Stat. 407*), this sum having originally been exacted from the estate represented by her under color of the legacy tax provisions of the Act of June 13, 1898 (*Chap. 448, 30 Stat. 448, 464-5*). The trial court dismissed the petition (*R. 13*) and made findings of fact (*R. 10-12*) and this appeal was taken (*R. 13*).

Statutes.

The relevant statutes, and portions of statutes, are as follows:

Act of June 27, 1902 (Chap. 1160, 32 Stat. 406-7).

"Chap. 1160.—An Act To provide for refunding taxes paid upon legacies and bequests for uses of a religious, charitable, or educational character, for the encouragement of art, and so forth, under the Act of June thirteenth, eighteen hundred and ninety-eight, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Treasury, under appropriate rules and regulations to be prescribed by him, be, and he is hereby, authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to the corporations, associations, societies, or individuals as trustees or executors, such sums of money as have been paid by them as taxes upon bequests or legacies for uses of a religious, literary, charitable, or educational character, or for the encouragement of art, or legacies or bequests to societies for the prevention of cruelty to children, under the provisions of section twenty-nine of the Act entitled 'An Act to provide ways and means to meet war expenditures, and for further purposes,' approved June thirteenth, eighteen hundred and ninety-eight.

"Sec. 2. That the Secretary of the Treasury, under rules and regulations to be prescribed by him, be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, sums paid for documentary stamps used on export bills of lading, such stamps representing taxes which were illegally assessed and collected.

"Sec. 3. That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the Act approved June thirteenth, eighteen hundred and ninety-eight, entitled 'An Act to provide ways and means to meet war expenditures, and for other purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said Act approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two.

"Sec. 4. That taxes which shall have accrued before the taking effect of the Act of April twelfth, nineteen hundred and two, entitled 'An Act to repeal war revenue taxation, and for other purposes,' and since July first, nineteen hundred, upon securities delivered or transferred to secure the future payment of money, are hereby remitted."

Act of July 27, 1912 (Chap. 256, 37 Stat. 240).

"Chap. 256. An Act Extending the time for the repayment of certain war-revenue taxes erroneously collected.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all claims for the refunding of any internal tax alleged to have

been erroneously or illegally assessed or collected under the provisions of section twenty-nine of the Act of Congress approved June thirteenth, eighteen hundred and ninety-eight, known as the war-revenue tax, or of any sums alleged to have been excessive, or in any manner wrongfully collected under the provisions of said Act may be presented to the Commissioner of Internal Revenue on or before the first day of January, nineteen hundred and fourteen, and not thereafter.

"Sec. 2. That the Secretary of the Treasury is hereby authorized and directed to pay, out of any moneys of the United States not otherwise appropriated, to such claimants as have presented or shall hereafter so present their claims, and shall establish such erroneous or illegal assessment and collection, any sums paid by them or on their account or in their interest to the United States under the provisions of the Act aforesaid."

R. S. 3228.

"All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued: *Provided*, That claims which accrued prior to June six, eighteen hundred and seventy-two, may be presented to the Commissioner at any time within one year from said date. But nothing in this section shall be construed to revive any right of action which was already barred by any statute on that date."

Report of Committee.

The report of the Committee on Judiciary of the House of Representatives recommending the enactment of the Act of July 27, 1912 (*House Report No. 848, Sixty-Second Congress, Second Session*) will be referred to herein and is, in full, as follows:

REPAYMENT OF CERTAIN WAR-REVENUE TAXES.

JUNE 6, 1912.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. GILLICUDDY, from the Committee on the Judiciary, submitted the following

REPORT.

[To accompany H. R. 24699.]

The Committee on the Judiciary, having had under consideration the bill (H. R. 24699) extending the time for the filing of claims for the repayment of certain war-revenue taxes erroneously collected, report the same back with the recommendation that it be amended as follows, and that as amended the bill do pass:

Line 6, page 1, strike out the words "July first" and insert in lieu thereof the words "June thirteenth."

Line 3, page 2, strike out the word "the" and insert in lieu thereof the word "such."

Line 4, page 2, strike out the word "of" and insert a comma after the word "collection."

This bill was prepared at the request of and has the approval of the Committee on Claims, before

which private bills are pending, and it also has the approval of the Secretary of the Treasury.

The sole object of this bill is to extend the time to January 1, 1914, for the filing of claims for refund of taxes erroneously assessed or illegally collected under the war-revenue act of June 13, 1898. (See *Knowlton* v. *Moore*, 178 U. S. Rep., p. 41 *et seq.*).

Congress has passed acts for the refund of certain taxes, such as on foreign bills of lading, manifests, and foreign bills of exchange, as well as passing the act of June 27, 1902, which provided for the refund of certain taxes collected on charitable bequests and certain contingent beneficial interests, but no provision has as yet been made for the refund of taxes illegally collected where the rates were excessive or the tax was illegally exacted, under decisions of the United States courts, such claims being barred under section 3228 of the Revised Statutes, which requires a claim for refund to be made within two years from the date of the payment of the tax.

These cases were practically barred at the time of the adjudication of the questions involved by the courts, and these taxes are practically trust funds in the United States Treasury belonging to the claimants, and a reasonable time ought to be given in which to present these claims, which your committee is of the opinion should be fixed as January 1, 1914.

Congress has repeatedly passed special acts under the same conditions, and there appears to be many bills providing for the refund of such taxes which have passed the Senate at this session, in which favorable reports have been made and which are now pending on the House Calendar, and some of which are yet pending before the House Committee on Claims. Furthermore, the Secretary of the Treasury has several times recommended that the

general legislation be enacted giving these claimants additional time in which to present claims for the refund of taxes erroneously assessed or illegally collected under the act of June 13, 1898, commonly known as the Spanish War revenue-tax act.

The particular taxes sought to be refunded under the authority of this legislation were those collected on legacies and inheritances, in accordance with section 29 of the act above mentioned. The Treasury Department exacted a tax on the full value of the estate, while the Supreme Court of the United States in *Knowlton* v. *Moore* decided that the tax should have been collected on the distributive interest; and as the law provided that legacies under $10,000 should be exempt from this taxation, the court further held that where the distributive share was less than $10,000 no tax thereon was collectible.

Facts.

The findings of fact by the Court of Claims show that:—

1. Appellant's decedent died intestate on June 1, 1902 (*R. 10*).

2. Letters of administration issued on June 9, 1902 (*R. 10*).

3. "On July 1, 1902, the debts of said decedent had not been ascertained or paid, the expenses of administration had not been ascertained, and the time allowed for the presentation of claims against said estate had not expired."—*Finding of fact by the Court of Claims.—R. 11.*

4. All personalty of the estate of said decedent was in the possession of appellant, as administra-

trix, and her co-administrator, until subsequent to July 1, 1902, except $500.00 each ($1,500.00 in all) advanced to each of three next of kin on June 12, 1902, and $500.00, additional, advanced to one of them on June 25, 1902 (*R. 10*).

5. On May 29, 1903, the Collector of Internal Revenue exacted from the estate, assuming to act under the legacy tax provisions of the Act of June 13, 1898, the sum of $6,721.71 which was paid without protest and in the ordinary course of business turned over to defendants (*R. 11*) and has never been refunded (*R. 12*).

6. Application for refund, under the Act of June 27, 1902, was made on March 17, 1914 (*R. 11–2*).

7. Unfavorable action, by the Treasury Department, on the above application was taken on October 15, 1915, the Acting Commissioner of Internal Revenue, saying:—

> "Since no claim for the tax was filed until March 17, 1914, and since no part of the tax was paid upon charitable, educational or religious bequests, the limitation imposed in the Act of July 27, 1912, operates to bar consideration of the claim and it can not, therefore, be reopened."—*R. 12*.

8. Petition was filed in the Court of Claims on March 9, 1916 (*R. 1*) and judgment of dismissal entered (*R. 13*) and this appeal duly taken (*R. 13*).

ARGUMENT.

Outline.

Appellant relies upon the simple proposition that Congress directed the payment to her of the sum sued for, which the Attorney General had declared was a trust fund (*infra, p. 13*), held for her benefit. Appellees claim, in effect, that the trust was repudiated by the Act of July 27, 1912. Appellant says that there was no intent to repudiate, no express repudiation, and that the purpose to avoid an admitted moral obligation cannot be imputed to Congress when to accomplish that result it is necessary to find a repeal by implication of a statute not mentioned in the act alleged to affect the repeal.

It will be argued that:

A. *The sum sued for is within the refunding provisions of the third section of the Act of June 27, 1902.*

B. *The Act of June 27, 1902, contains no limitation as to the time during which application for the refunds which it directs may be made and there is no limitation applicable thereto, at least prior to the Act of July 27, 1912, and,*

C. *The Act of July 27, 1912, did not destroy or modify rights created by the refunding provision of the third section of the Act of June 27, 1902.*

The foregoing will be discussed separately and in order:—

A.

The sum sued for is within the refunding provisions of the third section of the Act of June 27, 1902.

The refunding provision of the third section of the Act of June 27, 1902, is as follows:

> "That in all cases where an executor, administrator, or trustee shall have paid, or shall

> hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the Act approved June 13, 1898, entitled 'An Act to provide ways and means to meet war expenditures, and for other purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July 1, 1902." (*For the entire Act, see supra, 2–3*).

The fourth finding of fact, in this case, by the Court of Claims, is:

> "On July 1, 1902, the debts of the said decedent had not been ascertained or paid, the expenses of administration had not been ascertained, and the time allowed for the presentation of claims against said estate had not expired."—*R. 11.*

The result of the foregoing is that the interests in the estate here represented were "contingent," on July 1, 1902, within the intendments of the third section of the Act of June 27, 1902.

United States v. Jones, 236 U. S. 106;
McCoach v. Pratt, 236 U. S. 562.

The foregoing does not appear to be disputed by appellees; in fact it seems to have been admitted by the Treasury Department in basing the rejection of the claim (*R. 12*) on the sole ground that the first act of grace (*Act of June 27, 1902*) was destroyed by the second act of grace (*Act of July 27, 1912*).

B.

The Act of June 27, 1902, contains no limitation as to the time during which application for the refunds which it directs may be made, and there is no limitation applicable thereto, at least prior to the Act of July 27, 1912.

The Act of June 27, 1902, contains no limitation as to the time for claiming the refunds directed by its third section.

It was an act of grace by which Congress created a legal obligation where only a moral obligation would otherwise, at least in many instances, exist. Such acts are within the powers of Congress (*United States v. Realty Company, 163 U. S. 427*).

The principle announced in *United States v. Wardwell, 172 U. S. 48*, appears to apply.

> "This is a continuing promise, and one to which full force and efficacy should be given. . . . There is no occasion for suit until after his application for a warrant is refused. When the contract created by the promise . . . is broken, then a claim for the breach of contract first accrues, and the limitation prescribed by section 1069 begins to run." *172 U. S. 48, 52–3.*

R. S. 1069, referred to in the foregoing, requires *suits* to be brought within six years from the accrual of cause of action. There is no suggestion, in this case, that it was not complied with.

R. S. 3228, *supra*, is the only statute of limitations, prior to the Act of July 27, 1912, applicable to the presentation to the Commissioner of Internal

Revenue of claims for the refund of internal revenue taxes. It applies to:—

> " all claims for the refunding of any tax alleged to have been erroneously or illegally collected, . . . "

It is a part of the internal revenue system (*United States v. Hvoslef, 237 U. S. 1; Dodge v. Osborne, 240 U. S. 118*) and the period prescribed is two years next after the cause of action accrues.

Section 3228 does not apply to applications for the refunds directed by the third section of the act of June 27, 1902, for, as said by this Court in *United States v. Hvoslef, 237 U. S. 1;* citing *Fidelity Trust Company v. United States, 45 Ct. Cls. 362, 222 U. S. 158; United States v. Jones, 236 U. S. 106; Thatcher v. United States, 149 Fed. 902,* and *United States v. Shipley, 197 Fed. 265,*—

> " The same rule must obtain "

as to both the Act of June 27, 1902, and that of July 27, 1912, and—

> " in this view we are not concerned in the present case with questions arising under the general provisions of the internal revenue laws."—*United States v. Hvoslef, 237 U. S. 1, 10-1.*

Whether R. S. 3228 limited applications for re-refunds under the third section of the Act of June 27, 1902, was before the Attorney General in *The Daly Case, 26 Op. Atty. Gen. 195.* Citing *United States v. Wardwell, 172 U. S. 48,* he said:

> " It cannot be held that claims arising under this Act are barred, because of the failure of the claimants to present them for allowance within two years from the date of payment. The provisions of the Act are special, and apply

to a particular class of obligations against the Government. Being special, these claims are not governed by the provisions of the prior general statute (R. S. 3228)." *26 Op. Atty. Gen. 194, 197.*

And immediately following the foregoing:—

"Suits brought to recover money due under this act are *not 'actions' for the recovery of taxes*, but for money held by the Government in trust for the benefit of the parties to whom it rightfully belongs. The Act, by its terms creates and acknowledges the obligation of the Government. A method is prescribed by which each party can secure the money belonging to him whenever he wishes it. No time has been fixed by any rule of the Secretary of the Treasury, which has been called to my attention, within which a claimant must apply for it, or after which the money is forfeited to the Government. It is, therefore, an obligation payable on demand, and the statute of limitations does not begin to run until there has been a refusal to pay, or something equivalent thereto." *26 Op. Atty. Gen. 194, 197.*

This decision was rendered on March 11, 1907. To the same effect is the decision of the Comptroller of the Treasury (*13 Comp. Dec. 707*) rendered on April 17, 1907. These dates are significant.

In *Thatcher v. United States, 149 Fed. 902*, the Circuit Court for the District of Massachusetts said:—

"The answer to the contention of the United States is simple. The petition before the Court is *not based upon the illegality of the tax*, which it nowhere asserts. It seeks only the free bounty of the Government, given by the Act of 1902, which reads as follows: . . .

"The petitioners could not at any time have maintained suit to recover the tax as having been illegally collected. They had paid it vol-

untarily, not under protest. Their claim to a refund, if they had any, was moral only, and not legal. It appealed only to the Government's sense of fairness and could be satisfied only by the bounty of the United States given upon such terms as Congress saw fit to impose. . . . The Act of 1902 fixes no time within which the claim for a refund must be filed with the Collector and no departmental regulation has been called to the attention of the Court. . . . *That the tax paid by the petitioners was illegally collected is irrelevant to the issues* raised by the petition." *149 Fed. 902, 903-4.*

So, too, in *United States v. Shipley. 197 Fed. 265*, the Circuit Court of Appeals for the Third Circuit, in an opinion by Judge Gray, said:—

"The refunding act admittedly contains, neither expressly nor by implication, any limitation within which application must be made to the Secretary of the Treasury or any office of the Treasury Department." *197 Fed. 265, 272.*

And:—

"It hardly needs argument to support the statement that if the limitation prescribed in section 3228 does not *proprio vigore*, apply to claims made under the special refunding act of June 27, 1902, it is entirely beyond the power of the Secretary of the Treasury or the Commissioner of Internal Revenue to prescribe such a limitation. To hold otherwise would bring us to the absurd conclusion that the Secretary, in the guise of a regulation, could curtail or diminish the right which Congress, by lawful enactment had conferred upon a designated class of persons. If he could by any regulation have adopted the two years period of section 3228, he could likewise have prescribed any longer or shorter period." *197 Fed. 265, 272.*

And see:

Rosenfeld v. Scott, 232 Fed. 509.

All the foregoing is understood to be conceded by appellees. It is set forth at length to direct attention to the long and uniform line of authority, existing when the Act of July 27, 1912, was passed, to the effect that *although* sums directed to be refunded by the third section of the Act of June 27, 1902, had been illegally collected (and this was true whether the collection was before or after June 27, 1902; *Vanderbilt v. Eidman, 196 U. S. 480, 497–500*), claims and suits to enforce the right to refund were to obtain a gift or bounty rather than to recover moneys illegally collected.

C.

The Act of July 27, 1912, did not destroy or modify rights created by the refunding provision of the third section of the Act of June 27, 1902.

Appellees rely upon that provision of the Act of July 27, 1912, which provides that "all claims" to which its first section applies may be presented to the Commissioner of Internal Revenue on or before January 1, 1914,—

"and not thereafter."

The letter rejecting appellant's claim (*supra, 8*) implies that, rather oddly, the Treasury Department holds that these words fix a limitation upon the third section of the Act of June 27, 1902, without applying it to the first section of the same Act. That is, it is intimated that if the claim were for refund of a sum exacted in respect of a charitable bequest (*Section 1*), instead of in respect of a contingent interest (*Section 3*), the filing after January 1, 1914, would have made no difference. In other words, the Treasury theory is that the same phrase

in the Act of 1912 has two meanings, one meaning applicable to part of the Act of 1902, an opposite meaning applicable to another part.

The Act of July 27, 1912, contains no direct or express reference to the Act of June 27, 1902, but appellant admits that if her application to the Commissioner (*R. 11-2*), made on March 17, 1914 (*R. 11*), is to be regarded as a——

> "claim for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected,"

under Section 29 of the Act of June 13, 1898, and amendments, *within the intendments of the Act of July 27, 1912*, and not *an application for a gift or bounty not intended to be affected by the later Act* (also an act of grace), it was made too late and the decision below must be affirmed.

The question is wholly one of Congressional intent—*Rodgers v. United States, 185 U. S. 83, 86.*

The title of the Act of July 27, 1912, indicates no purpose to withdraw any bounty or to impair, alter or destroy anything granted by any previous enactment. This title, in full, is:—

> "An act extending the time for the repayment of certain war-revenue taxes erroneously collected."

So if this act operated as appellees contend, its title was misleading. There was not, in the title, even the familiar "and for other purposes," to cover an intent different from that in terms proclaimed.

The Act of July 27, 1912, was passed five years after the Attorney General and the Comptroller of the Treasury had held (*supra, 13*) that the benefits

of the third section of the act of June 27, 1902, were not limited by R. S. 3228. And *R. S. 3228 was the only statute which stood in any degree in the way of the presentation and payment of any claims affected by the Act of July 27, 1912*. The inference seems irresistible that the *sole purpose* of the Act of 1912 was to afford relief from the requirements of R. S. 3228.

This inference is strengthened by a comparison of the general statute of limitations (*R. S. 3228*) and the relieving Act (*of July 27, 1912*). *Both acts use identical words in stating the general subject-matter to which they apply.* Both of them begin:—

> "All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected."

The foregoing words, common to both statutes, are followed in R. S. 3228 by the words necessary to include penalties and in the Act of 1912 by those necessary to restrict their application to sums collected under color of Section 29 of the Act of June 13, 1898. After these distinguishing words both R. S. 3228 and the Act of 1912, continue as follows:—

> "Or of any sums[1] alleged to have been excessive, or in any manner wrongfully collected."

After the foregoing, the Act of 1912, says, "under the provisions of said Act may" and R. S. 3228 says, "must". Then both acts say:

> "presented to the Commissioner of Internal Revenue."

Then follows the limitation. In R. S. 3228 it is,

> "within two years next after the cause of action accrued."

[1] "Sums," in the Act of 1912; "sum," in R. S. 3228.

In the Act of July 27, 1912, it is:—

> "on or before the first day of January, 1914, and not thereafter."

Appellant is unable to perceive how it could be held that her application of March 17, 1914 (*R. 11–12*), was referred to by the words of the Act of July 27, 1912, when *it was not within the effect of the same words in R. S. 3228.* It has been shown that it had repeatedly been held that R. S. 3228 did not apply to such an application (*supra, 11–15*). Congress knew of these decisions and must be presumed to have formulated the Act of 1912 in the light of this knowledge. From the beginning all courts to which the question had been presented, as well as the Attorney General and the Comptroller, had held that claims under the third section of the Act of June 27, 1902, are *not claims for taxes illegally collected* but FOR A GIFT OR BOUNTY PROVIDED BY CONGRESS. Whether the collection was illegal or otherwise, or that it was actualy illegal, has nothing to do with such a claim.

The report of the Committee on Judiciary of the House of Representatives (*supra, 5–7*) recommending the enactment of July 27, 1912, is printed in full herein. This report may be referred to if necessary in order to determine the legislative intent:

> *Buttfield v. Stranahan, 192 U. S. 470, 495.*
> *The Delaware, 161 U. S. 459, 472;*
> *Danciger v. Cooley, 248 U. S. 319, 325.*

This report (*House Report No. 848, Sixty-second Congress, Second Session*), affords support to the view that Congress was concerning itself with the removal of the limitations fixed by R. S. 3228, where it applied, and had no thought of taking away any-

thing accorded by the Act of June 27, 1902. It distinguishes (*a*) the subject-matter of the new Act from (*b*) the subject-matter of the Act of June 27, 1902, saying that *the latter had been provided for* and that *the former should be.* The following is quoted:—

> "Congress has passed acts for the refund of of certain taxes, such as . . .
>
> "The Act of June 27, 1902, which provides for the refund of certain taxes collected on charitable bequests and certain contingent beneficial interests.
>
> "But no provision has as yet been made for the refund of taxes illegally collected where the rates were excessive or the tax was illegally exacted, under decisions of the United States courts, such claims being barred under section 3228 of the Revised Statutes, which requires a claim for refund to be made within two years from the date of the payment of the tax.
>
> "These cases were practically barred at the time of the adjudication of the questions involved by the courts, and these taxes are practically *trust funds in the United States treasury* belonging to the claimants and a reasonable time ought to be given in which to present these claims, which your Committee is of the opinion should be fixed as January 1, 1914." *Report of Committee on Judiciary, House Report No. 848, Sixty-second Congress, Second Session.*[1]

Moreover, the chairman of the sub-Committee of the Committee on Judiciary, in charge of the measure on the floor of the House of Representatives, explaining its purpose and effect (*Congressional Record, Sixty-second Congress, Second Session, pp. 8309-8310*), declared that the purpose was to relieve those whose claims were barred by R. S. 3228. This statement is competent to show the purpose of Congress (*United States* v. *St. Paul, Minneapolis*

[1] This extract is paragraphed here for convenience in reading.

& Manitoba Railway, 247 U. S. 310, 318). R. S. 3228, as has been shown (*supra, 11–15*), had no effect upon appellant's application—the denial of which led to this suit.

It would thus seem clear, from the language of the Act of July 27, 1912, and from extraneous facts to which reference is properly made, that *the purpose of Congress was to provide for claims not covered by the Act of June 27, 1902*, and *to extend the time for filing claims otherwise barred* or, at least, soon to be barred by R. S. 3228. All this is quite at variance with the notion that the Act of 1912 was intended in any way to modify or affect the Act of 1902.

If Congress had intended to repeal or modify the Act of June 27, 1902, when enacting that of July 27, 1912, it would have explicitly declared that purpose. It was under no necessity to disguise or furtively to pursue any intention in the premises which it entertained (*Cochnower v. United States, 248 U. S. 405*). Although the Act of July 27, 1912, contains no reference to the Act of June 27, 1902, the contention of appellees is, in effect, that the later Act repeals the refunding provision of the earlier Act. The word "repeal" is used advisedly, for if the limitation of the Act of 1912 became a part of the Act of 1902, the Act of 1902 ceased to be effective on January 1, 1914. If appellees are right, the Act of June 27, 1902, has wholly ceased to speak. *Either that Act continues to proclaim that whoever has paid or shall pay in respect of a contingent interest may recover, upon proper demand, or it does not speak at all.* The view that it was "limited," so that after January 1, 1914, such demands could not be made cannot be diminished to a claim of mere modification or amendment. An amended statute continues to speak with some, although modified, effect. On appellee's

theory, the refunding provision of the Act of June 27, 1902, no longer has any effect at all. But if this result is to be found in the Act of 1912, it must be there by implication only, and by an implication so attenuated that no word or series of words can be pointed to as specifically or clearly indicating the Act thus affected. It would be strange indeed should one act of grace imply a subtraction from another act of grace to which it nowhere refers.

The contention that the limit of the Act of 1912 applies to the Act of 1902 is considered, therefore, to do violence to the rule that *repeals by implication are not favored* (*Allen v. United States, 204 U. S. 581; Washington v. Miller, 235 U. S. 422*). The Acts of 1902 and 1912, are not inconsistent, they can be construed so as to give effect to both. The rule is believed to require such construction where practicable.

> "It is well settled that repeals by implication are not favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed—is, if possible, to give effect to both." *Frost v. Wenie, 157 U. S. 46.*

> "That it has not been expressly or by direct terms repealed is admitted; and the question resolves itself into the more narrow inquiry, whether it has been repealed by necessary implication. We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it; for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law, and those of the old, and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy. *Wood v. United States, 16 Pet. 343, 362-3.*

". . . statutes which apparently conflict with each other are to be reconciled, as far as may be on any fair hypothesis, and validity given to each, if it can be, and is necessary to conform to usages under them, or to preserve the titles of property undisturbed." *Beale v. Hale, 4 How. 37, 51.*

"Repeal by implication is not favored in the law. It is held to occur only where different statutes cover the same ground and *there is a clear and irreconcilable conflict* between the earlier and the later. The rule, as thus stated, is so well settled that discussion and the citation of authorities are unnecessary." *Board of Supervisors of Wood County v. Lackawanna Iron and Coal Company 93 U. S. 619, 624.*

See, also:

United States v. Claflin, 97 U. S. 546, 541-2;
McCool v. Smith, 1 Black, 459;
United States v. Tynen, 11 Wall. 88, 93;
Red Rock v. Henry, 106 U. S. 596, 601;
Henderson's Tobacco, 11 Wall. 652;
King v. Cornell, 106 U. S. 395, 396.

It is submitted that between the Acts of June 27, 1902, and July 27, 1912, there is no repugnancy; that *to reconcile and give effect to each it is necessary only to give to both the interpretation and effect naturally suggested by the words themselves*—as to the Act of June 27, 1902, to apply a judicial interpretation long established.

The case of the Government would be no stronger if its contention could be reduced to the scope of mere insistence that the Act of June 27, 1902, was modified or amended by that of July 27, 1912.

"The rule of statutory construction is well settled that a general act is not to be construed

as applying to cases covered by a prior special statute on the same subject. On this principle we held in *Townsend v. Little, 109 U. S. 504*, that special and general statutory provisions may subsist together, the former qualifying the latter. See, also, *Churchill v. Crease, 5 Bing. 177; Magone v. King, 2 C. C. A. 383, 1 U. S. App. 267, 51 Fed. 525, and cases cited; State v. Clarke, 25 N. J. L. 54.*" *United States v. Nix, 189 U. S. 199.*

See, also, the elaborate review of cases by the late Mr. Justice Brewer, delivering the opinion of this Court in *Rodgers v. United States, 185 U. S. 83.* In that opinion the following is quoted, with approval:

"... the legislature ... does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do."—*Fitzgerald v. Champenys, 30 L. J. Ch. N. S. 782, 2 Johns. & H. 31-54—Quoted, 185 U. S. 88.*

And, summarizing the cases, Mr. Justice Brewer said:—

"It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general,—the terms of the general broad enough to include the matter provided for in the special,—the fact that the one is special and the other general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special." *185 U. S. 83, 87-8.*

And see:

Ex parte United States, 226 U. S. 420, 424.

Congress had been told by the Attorney General (*supra, 13*) that the money directed to be paid to this appellant was a trust fund; to retain this money in the Treasury it is necessary to conclude that Congress repudiated the trust and adopted the Act of July 27, 1912, with such repudiation in view. No such purpose is expressed in the act, or necessarily or even remotely implied, and the competent declarations of the Committee on Judiciary (which reported the measure) and the chairman of its subcommittee (who had charge of it while it was under discussion) are inconsistent with such an intention.

Conclusion.

The judgment below should be reversed.

All of which is respectfully submitted.

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